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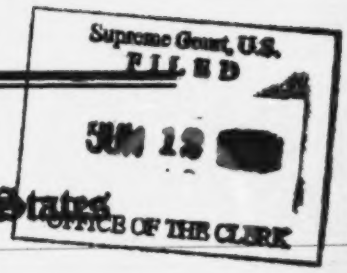

IN THE

Supreme Court of the United States

JERMAINE BONEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR THE PETITIONERS

1. In his petition, petitioner demonstrated (1) that the courts of appeals have developed differing approaches to the problem of a person who intentionally and repeatedly lies under oath in order to become a juror (Pet. 10-14) and that applying an actual bias standard to the deliberate concealment of felon status is not consistent with the tests applied in recent appellate decisions or with the requirement of juror impartiality (Pet. 14-23). In addition, petitioner explained (2) that several courts of appeals have held that trial courts cannot rely solely on challenged juror's testimony in order to determine that the juror acted without bias (Pet. 23-25), and that these principles should have especial force when the felon-juror repeatedly lied under oath and refused to provide post-verdict testimony without a grant of immunity. The government's argument ignores the conflict in the court of appeals decisions concerning deliberate deception by persons in order to become jurors by an unconvincing attempt to distinguish cases (Opp. 15-17). Moreover, the government never addresses the significant problems created by the decision below. (*See* Pet. 20-21.) The government blames the petitioner for failure to proffer testimony from other jurors (Opp. 18) despite the fact that the trial court's rulings prevented the petitioner from having any access to other jurors in order to obtain such information. (Pet. 23-24.) Thus, the government's argument fails to undermine petitioner's reliance on clear court of appeals precedent from three circuits requiring examination of other jurors. In sum, review by this Court is both necessary and appropriate.

2. In the first appeal below, the government successfully urged the court of appeals to draw upon circuit precedent concerning lying jurors. *See United States v. Boney*, Pet. App. at 46a (applying *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990)). Yet now the government seeks to present the problem of the lying felon-juror as unique and separate from

the lying juror problem. (Opp. 15-16.) Despite the government's "bait and switch" tactic on this point, this Court should examine the problem of the lying felon-juror mindful of the conflicting decisions of the courts of appeals concerning individuals who lie to become jurors. As petitioner explained (Pet. 11-14), the courts of appeals have taken divergent positions concerning the problem of a lying juror. In *Dyer v. Calderon*, 151 F.3d 970 (9th Cir. 1998) (en banc), the court found that lying to conceal disqualifying information led to the presumption of bias. "[A] perjured juror is unfit to serve even in the absence of such vindictive bias." 151 F.3d at 983. The *Dyer* court also relied upon *Clark v. United States*, 289 U.S. 1, 11 (1933), which recognized that "if the answers to the [*voir dire*] questions are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only." And the Ninth Circuit has subsequently applied *Dyer* in the context of a felon concealing felon status in order to sit on a jury. *Green v. White*, 232 F.3d 671 (9th Cir. 2000). Judge Randolph's dissent also concluded that a lying felon-juror is unfit to serve, and so a new trial should be granted. *Boney I*, Pet. App. 60a-65a. And the *Dyer* decision is consistent with well-considered *dicta* in *United States v. Colombo*, 869 F.2d 149, 151-52 (2d Cir. 1989) (Winter, J.). In sum, the case law concerning lying jurors demonstrates that a conflict exists among the differing approaches of the courts of appeals, which only this Court can resolve.[1]

3. Congress chose to ensure the constitutional guarantee of an impartial jury by excluding felons convicted of crimes punishable by imprisonment for one year or more. 28 U.S.C.

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[1] The petitioner in *Tucker v. United States*, No. 00-1726 (U.S. filed May 17, 2001), explained that the lower courts have reached conflicting results in determining whether to imply bias from a juror's lies during *voir dire*. This Court may want to consider the Petition in Mr. Boney's case in conjunction with the Tucker Petition.

§ 1865(b)(5). The exclusion applies without any showing that the felon would harbor a bias for or against any party. As petitioner demonstrated (Pet. 16-18), the government has been sedulous in enforcing the congressional command by successfully defending that exclusion against attack by parties who contend that felons should be allowed to sit on juries. *E.g., United States v. Barry*, 71 F.3d 1269 (7th Cir. 1995); *United States v. Greene*, 995 F.2d 793 (8th Cir. 1993). In addition, the government has repeatedly successfully insisted that felon-jurors be removed from juries during trial, *United States v. Webster*, 162 F.3d 308, 347-348 (5th Cir. 1998), *cert. denied*, 528 U.S. 829 (1999), or even during deliberations, *United States v. McFerren*, 907 F. Supp. 266 (W.D. Tenn. 1995), *aff'd*, 142 F.3d 437 (6th Cir. 1998), without any showing of bias. Yet the government contends in this case that after a verdict the challenging party must demonstrate actual bias in order to obtain a new trial. Perhaps not surprisingly, the government makes no attempt in its Opposition Brief to reconcile its divergent positions because, quite simply, they cannot be reconciled. If no showing of actual bias is required to preclude felons from juries or to remove them before deliberations end when they lie to become jurors, then no showing of actual bias should be required when the felon is uncovered after deliberations end. Such an outcome meets this Court's test stated in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)[2]:

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[2] The government (Opp. 14) seeks to draw support from two court of appeals decisions predating *McDonough Power* without explaining whether the analysis in those cases is consistent with *McDonough Power*, this Court's most recently articulated test. The government's citation of *Raub v. Carpenter*, 187 U.S. 159 (1902), is even more suspect because the government made no effort to explain whether *Raub*, a holding in a civil case based upon common law principles, has any continuing force in light of the federal law establishing qualifications adopted by Congress. *See* Pet. App. 58a-59a (Randolph, J., dissenting) (explaining *Raub*'s lack of

(continued...)

> a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for challenge for cause.

A felon can be challenged for cause without any showing of actual bias, as both the *Webster* and *McFerren* cases demonstrate. In the recent past, the cases before this Court involving allegations of jurors lying during *voir dire* involved situations where the lies hid a juror's actual bias, so it is unsurprising that the opinions of this Court reflect that, in such cases, the challenging party must demonstrate actual bias to obtain a new trial after verdict. *See Smith v. Phillips*, 455 U.S. 209 (1982) (juror seeking position with prosecutor's office); *Williams v. Taylor*, 529 U.S. 420 (2000) (juror concealing prior family relationship with prosecution witness and prior attorney-client relationship with prosecutor). Indeed, the same showing of actual bias would be required in such factual situations if the juror's lies were uncovered after the jury was empaneled but before or during deliberations. But any such actual bias requirement does not and should not apply to felons, who are excluded automatically without a showing of bias by congressional command.[3]

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[2] (...continued)
vitality); *see also* Pet. 14-16 (same).

[3] The government's reliance on *United States v. Humphreys*, 982 F.2d 254 (8th Cir. 1992), *cert. denied*, 510 U.S. 814 (1993), is misplaced because in that case the felon did not conceal his thirty-year old conviction during *voir dire* so the court properly held that the defendant could not complain thereafter. Nor can the government garner support from *United States v. Uribe*, 890 F.2d 554 (1st Cir. 1989), in which the felon revealed his conviction on the Juror Qualification form, but the defense counsel failed to ask for access to the form during *voir dire* as permitted by local court rule.

3. Finally, the Court should not rely upon the government's blithe assurances that the problem of lying felon-jurors is insignificant. (Opp. 17-18.) Of course, the *Boney* case in the D.C. Circuit and the *Green v. White* case in the Ninth Circuit demonstrate that the problem of individuals deliberately concealing felon status in order to serve as jurors is a significant and recurring one. And the problem is not limited to federal courts. For example, the Illinois courts have experienced this problem so often that it is now apparently the practice of Illinois prosecutors to obtain "rap sheets" for persons called for jury service in order to ensure that felons do not lie to become jurors. *E.g.*, *People v. Franklin*, 552 N.E.2d 743, 750-751 (Ill. 1990) (describing use of rap sheets during *voir dire*); *People v. Martin*, 587 N.E.2d 1228 (1st Dist. App. Ill. 1992) (prosecutor with access to rap sheets did not reveal during *voir dire* that certain panel members failed to disclose prior convictions or arrests). Other states have experienced the problem of felons not revealing their convictions. *Fleming v. State*, 687 So. 2d 146 (Miss. 1997) (deliberate concealment, new trial ordered); *Bennet v. State*, 414 S.E.2d 218 (Ga. 1992) (not deliberate concealment, no new trial). It is sheer speculation for the government to suggest that this problem will not recur.

Petitioner explained that the result in *Boney I* presents a serious risk of differing outcomes in civil and criminal cases. (Pet. 20.) The government provides no explanation of how those differing outcomes can be avoided. Nor does the government offer any solution to the very likely risk that the felon-juror testifying under a grant of immunity will seek to placate the government with answers tailored to preserve the government's victory. (Pet. 20-21.) Indeed, the outcome of this case, if left unreviewed by this Court, will make the government, not the courts, the ultimate arbiter of whether a new trial is granted by the use of the power to grant immunity from prosecution to the lying juror once the lies have been uncovered.

4. Petitioner demonstrated that the decisions of three courts of appeals rejected reliance solely upon the testimony of a challenged juror during a post-verdict juror bias hearing. (Pet. 23-25 (discussing *United States v. Tucker*, 137 F.3d 1016 (8th Cir. 1998); *United States v. Brantley*, 733 F.2d 1429 (11th Cir. 1984); *United States v. Forrest*, 620 F.2d 446 (5th Cir. 1980)).) The government attempts to distinguish *Brantley* and *Forrest* by contending that those cases concerned introduction of extraneous information into deliberations or other misconduct. (Opp. 19-20.) As the court of appeals below in *Boney II* recognized, however, one of the issues before the trial court was whether Mr. J might have brought before the jury impermissible extraneous information derived from Mr. J's own experiences in the criminal justice system. *Boney II*, Pet. App. 28a-29a. The government's attempt to distinguish *Tucker* (Opp. 18-19) is similarly unconvincing because the government points only to the district court's examination of Mr. J himself.[4] Yet all three courts of appeals decisions recognize that reliance only on the uncorroborated testimony of the challenged juror is insufficient.

The principle recognized in *Tucker*, *Brantley*, and *Forrest*, should apply with especial force when, as here, the challenged juror would not provide testimony without an immunity grant. Although immunized fact witnesses appear on occasion in criminal trials, it is quite a different matter to have to immunize a juror in order to determine if the juror's prior criminal experiences affected the decision in the case. Surprisingly, the government attempts to blame petitioner for failure to "proffer [evidence] suggesting that testimony from

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[4] The government attempts to bolster its position by asking this Court to place reliance in the decision of "two different district court judges" (Opp. 16), ignoring the fact that the decisions of the first district judge were twice rejected by the court of appeals (in *Boney I* and *Boney II*) and therefore cannot be relied upon at all.

other jurors would undermine [the lower court's] conclusion." (Opp. 18.) The local court rules prevented any contact with the jurors without court supervision (*see* Pet. 23-24), and the government repeatedly contested petitioner's requests to be allowed access to the other jurors or other information. Thus, the blame for the lack of any other evidence lies with the government, not petitioner.

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Throughout the proceedings in this case, the government's desire to salvage a questionable conviction has blinded it to the serious damage its position has caused and will cause to the public's faith in the impartiality of the jury system. Only by granting the writ and reversing the flawed decisions below can this Court restore some confidence that a jury will truly reflect the sense of justice of the community as Congress intended in excluding felons from juries.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, certiorari should be granted.

Respectfully submitted,

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